

STATE OF MICHIGAN
COURT OF APPEALS

JONATHON PRUETT and CATHERINE
PRUETT,

UNPUBLISHED
January 17, 2006

Plaintiffs-Appellants,

v

FLAGSTAR BANK and BRIAN IOLA,¹

No. 256080
Oakland Circuit Court
LC No. 02-074495-CZ

Defendants-Appellees.

Before: Donofrio, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Plaintiffs appeal from an order granting defendants' motion for summary disposition and denying plaintiffs' motion for summary disposition. We affirm.

Plaintiffs owned a parcel of property that was listed as commercial and contained their residence, an eight-unit motel, and an outbuilding. Plaintiffs were purchasing the property on a land contract, and they had a balance of approximately \$92,976.00 remaining. In July 2001, plaintiffs listed the property for \$365,000. Paul Harris, a realtor for American Associates, Inc., introduced plaintiffs to Marilyn Williamson as a prospective buyer. Apparently, none of the parties knew at the time that Marilyn Williamson was an alias for LaNise Marilyn Sykes, which is apparently another alias for Lita Skinner.² Harris gave plaintiffs a check for \$65,000 and told plaintiffs that Williamson was interested in buying the property for \$435,000. Plaintiffs were told that they would receive a net amount of approximately \$340,000 and that Williamson would request an additional \$90,000 from defendant Flagstar Bank to make repairs. Plaintiffs accepted this offer.

¹ Apparently, plaintiffs misspelled Brian's last name as "Iola" in their initial complaint. It is clear throughout the record that "Aiello" is the correct spelling.

² We will refer to this person as Williamson because that is how she was known to the parties at the relevant times and because it is not clear to us what her real name is. She was named as a defendant below, but she was arrested by the FBI on March 29, 2002, and she has apparently been in federal custody ever since. A default judgment was entered against her on May 25, 2004, and she is not a party to this appeal.

Randy Haney, owner of American Associates, told plaintiffs that they had to divide the property into two parts for the bank. Defendant Brian Aiello, a loan agent for defendant Flagstar Bank, told plaintiffs that they had to rewrite the description of the property. Plaintiffs initially accurately described the property as a commercial eight-unit motel. Aiello said that the property would, instead, need to be described as a three-bedroom apartment so that Williamson could obtain the necessary financing. Plaintiffs subsequently contacted Harris to tell him that they wanted to back out of the deal. Harris allegedly told plaintiffs that they could not back out of the deal because Williamson, being African-American, could sue plaintiffs for discrimination. Defendants assert that they advised plaintiffs that they were not obligated to go forward with the transaction.

Clayton Township, where the property is located, denied the split. Nevertheless, either Williamson or Harris obtained a survey splitting the property into a one-acre parcel containing the house, driveway, and outbuilding, and a four-acre parcel containing the eight-unit motel. The purchase price for the former was to be \$165,000, and the purchase price for the latter was to be \$270,000. On March 15, 2002, the parties closed on the one-acre parcel, but in exchange for a deed, Williamson gave plaintiffs \$132,000 that she had obtained via a loan from Flagstar Bank, secured by a mortgage. Plaintiffs agreed to carry a \$33,000 mortgage from Williamson. Plaintiffs spent most of the \$132,000 paying off their land contract. Closing on the second parcel was scheduled for March 28, 2002, but did not take place because the appraiser was on vacation that day. The next day, Williamson was arrested by the FBI for mortgage fraud in several states. Williamson never paid the \$33,000, and she never purchased the second parcel. On January 21, 2003, the trial court set aside the deed to Williamson and gave plaintiffs title free and clear of any interest she might have.

On September 5, 2002, Flagstar Bank sought to foreclose on its mortgage securing the loan it had made to Williamson. Plaintiffs argue that the mortgage is void for fraud, and defendants argue that plaintiffs received a windfall. The trial court ruled that plaintiffs are not liable for paying the mortgage loan to Flagstar Bank, but the bank may foreclose the mortgage. We review motions for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Plaintiffs first argue that the mortgage is null and void because it was acquired through fraud to a fictitious person whose interest has been extinguished. Plaintiffs rely on a case in which our Supreme Court found a deed void as a forgery because it was procured by fraud, where the plaintiff was tricked into signing what he thought was only a lease. *McGinn v Tobey*, 62 Mich 252, 257, 259; 28 NW 818 (1886). In Michigan, courts do not distinguish between forged instruments and instruments procured by fraud, and both are void. *Horvath v National Mortgage Co*, 238 Mich 354, 358; 213 NW 202 (1927).

However, the transaction at issue here did not entail a person signing a mortgage she thought to be something else, nor did it entail a person signing someone else's name in an attempt to bind that other person. The nature of the transaction was accurately known to the parties. Plaintiffs intended to transfer their property to Williamson in exchange for the proceeds of that mortgage, and in fact did so. Williamson used an alias, but there is no evidence that her doing so induced any of the parties to compromise any legal rights they would not otherwise have compromised, nor did it mislead any of the parties as to the nature of the transaction. Further, Williamson's deed was valid at the time the mortgage was entered into. Where the

transaction itself proceeded exactly as all parties intended and voluntarily assented to, save only for one person's use of an alias, we find the mortgage valid. See 54A Am. Jur. 2d *Mortgages* § 27 (2004).

Plaintiffs next argue that the trial court erred in finding their claims for negligent and fraudulent misrepresentation against Aiello and Flagstar Bank, based on statements Aiello allegedly made to plaintiffs, barred by MCL 556.132(2). Because the alleged representations did not include promises by defendants to make any sort of financial accommodations to plaintiffs, we agree that the representations fall outside the scope of the statute. However, we nevertheless affirm because plaintiffs failed to present sufficient evidence of their claims. *Morosini v Citizens Ins Co of America*, 224 Mich App 70, 86; 568 NW2d 346 (1997).

Negligent misrepresentation requires, among other things, a duty of care. *Law Offices of Stocker v Rose*, 174 Mich App 14, 33; 436 NW2d 70 (1989). In the absence of any obvious indications that Williamson was acting illegally, or the situation "where one entrusts himself to the protection of another," defendants are under no duty to a third party to inquire into their client's intended use of an otherwise-legal mortgage to harm that third party. See *Buczkowski v McKay*, 441 Mich 96, 104 n 9, 109; 490 NW2d 330 (1992). Unlike the situation in *Baker v Arbor Drugs, Inc*, 215 Mich App 198; 544 NW2d 727 (1996), plaintiffs were not clients of defendants, and defendants did not voluntarily assume a duty to monitor the use of their services for potential hazards.

Fraudulent misrepresentation requires plaintiffs to have suffered harm because of their reliance on defendants' knowingly or recklessly false representations. *Hord v Environmental Research Institute of Michigan*, 463 Mich 399, 404; 617 NW2d 543 (2000). Plaintiffs argue that they would not have entered into the first closing if they had not relied on defendants' false representation that the second closing would occur. Plaintiffs' alleged injury is failing to receive the \$270,000 for the second parcel; however, they did not receive that because Williamson was arrested by the FBI. Plaintiffs' injury was not because defendants made a knowingly or recklessly false representation, but because the FBI apprehended Williamson when they did.

Affirmed.

/s/ Pat M. Donofrio
/s/ Stephen L. Borrello
/s/ Alton T. Davis